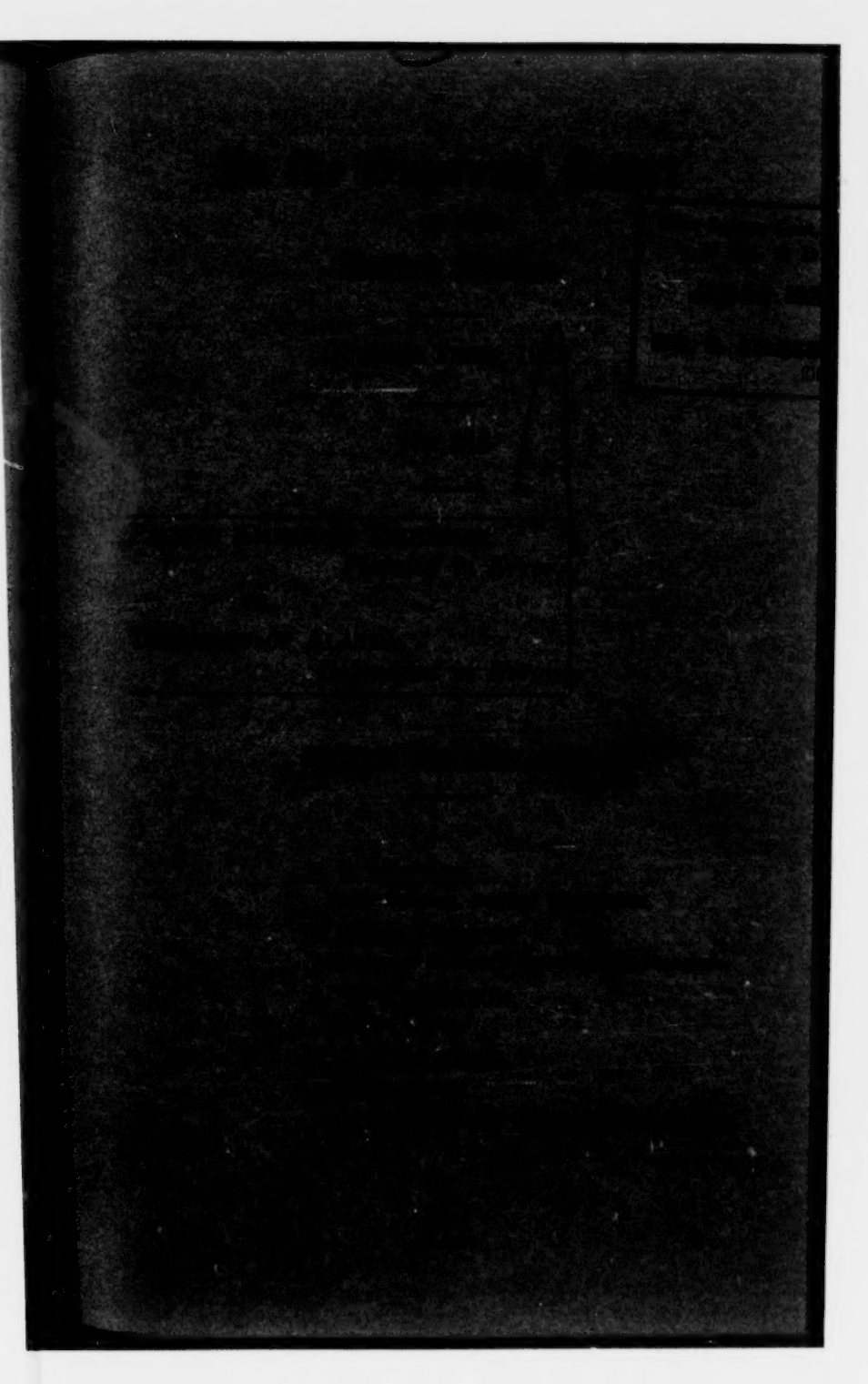



DR SPRING SYN
MAINBETO

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 246

PACIFIC AMERICAN FISHERIES,
Plaintiff in Error,
vs.
TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING

INTRODUCTION

We ask for a rehearing in this case because we believe that the court has erroneously interpreted the statutes applicable. The decision [1] as it now stands creates a conflict of jurisdiction between the federal and territorial governments with respect to the regulation of fisheries, and imposes upon a packer the burden of determining which of these two conflict-

1. Printed in the Appendix.

ing jurisdictions shall control his operations. The uncertainty and confusion sure to follow this holding also impels us to present this petition.

The opinion is based largely upon the proposition that the Territory of Alaska possesses the power to regulate fisheries, not merely indirectly through taxation, but directly and openly by means of game and fish laws.

The Act of Congress of June 26, 1906, (set out in the appendix to our reply brief) as amended by the Act of June 6, 1924, C. 274, (43 Stats. 464) provides a complete system of regulation for the fisheries of Alaska. This is in part accomplished by laying down certain statutory rules governing the place, time and manner of conducting fishing operations. But to a much larger extent the duty of prescribing rules and regulations is delegated to the Secretary of Commerce.

This authority of the Secretary of Commerce has been extensively exercised. The present regulations are embodied in a Department of Commerce Bulletin, dated December 5, 1925, which, in the form we have it, fills some eighteen singlespaced typewritten pages. The Secretary has divided the Territory into twelve fisheries areas. Each of these is subdivided into several districts, and regulations as to the time, place and

manner of fishing; the gear to be employed; the close seasons; the escapement of fish to be permitted, etc., are provided in great detail. In many instances different rules are prescribed for specifically named small streams, islands and indentations of the shore line. In other words, the Secretary of Commerce, pursuant to the Act mentioned, has covered exhaustively and minutely the whole ground of regulation of Alaskan fisheries.

And yet, according to the decision rendered in the instant case, "the only purpose of the restrictions (on altering the fish laws applicable to Alaska) was to prevent the Territory from doing away with all protection in a short sighted rush for fish." If this is so, the Territory may prescribe other different and entirely inconsistent rules, and all such rules will be valid. But the Territory derives its power from an Act of Congress. So does the Secretary of Commerce. Which set of enactments shall control? How can a packer comply with the law? Are the penalties of the Territorial Statutes applicable, or those fixed by the Act of June 6, 1924? Does the regulation which is latest in time control, or vice versa? The inevitable result of applying such a doctriine is confusion and conflict of jurisdiction.

This is not idle speculation and groundless foreboding. The Legislature of Alaska by its Act of

May 4, 1923, (Session Laws of Alaska, 1923, C. 95) assumed to create a close season for salmon in substantially all of that portion of Alaska lying east of the extended boundary between Alaska and Yukon Territory. That is to say, south and east of the 139th Meridian. This area was divided by the Act mentioned into two parts, whose close seasons were as follows:

I.) Between the 57th and 60th degrees of north lattitude, from August 10th to September 1st, and

(II.) South of the 57th parallel, between August 20th and September 9th.

The same waters are covered by the regulations of the Secretary of Commerce above referred to. These latter subdivide substantially the same area into six districts. For each a different close season is established as follows:

(a) (Yakutat District, falling within area I. above), July 20th to August 5th.

(b) (Icy Straits—Cross Sound District, falling within area I. above). No fishing after August 6th.

(c) (Central District, falling within area I. above). No fishing after August 11th.

(d) (Stikine River District, falling within area II. above). June 10th to June 30th.

(e) (Prince of Wales Island District, falling within area II. above). August 22nd to September 14th, and for the remainder of the year after October 15th.

(f) (Southern District, falling within area II. above). August 18th to September 14th, and for the remainder of the year after October 15th.

It is no exaggereation, we think, to assert that no human being can say when fishing is lawful in Southeastern Alaska, and when it is not.

Yet this discord arises from one single regulatory act of the Territorial Legislature. With the doors thrown open to Territorial regulations, as they have been by the decision herein, the situation is sure to become intolerable. (2)

Furthermore the adoption of this rule came as a complete surprise to us and to everyone familiar with the Alaskan situation. The point seemed so well settled that we considered the argument of the Attorney General merely perfunctory. We answered it only brifly. It is announced summarily and without citation of authority by the court. No mention is made of the case of *Auk Bay Salmon Canning Company v.*

2. This act was a mere "feeler" on the part of the Legislature of Alaska as is shown by House Concurrent Resolution No. 15 (Sess. L. Ao. 1923, p. 309), which directed the Attorney General "to bring one action, only, and to carry and prosecute the same through the courts, for the purpose of determining the validity of said act (C. 95); and reporting the outcome of the same to the 1925 Session of the Territorial Legislature."

U. S., 300 Fed. 907, in which the Circuit Court of Appeals for the 9th Circuit considered the matter at length and adopted the contrary doctrine. All in all we feel that we have not had our day in court, and that in all fairness we should be granted an opportunity to present this question fully. The case is important. It involves some ten thousand dollars in itself, and, conservatively, a quarter of a million dollars in other taxes, payment of which has been withheld pending this action. And, if the present opinion stands, it involves endless expense and loss until the uncertainties above pointed out have been resolved by future litigation.

These then are our reasons for submitting the present petition. We realize that this is not the place for an extended argument nor an elaborate brief. We would, however, like to indicate in a summary way and as briefly as possible some of the authorities and reasoning which we believe invalidates the court's opinion. What follows is an attempt to do so.

ARGUMENT

I.

Effect of the Act of June 30, 1886

One of the principal arguments advanced in the opinion in support of the rule referred to, is to the

effect that the Act of June 30, 1886, (24 Stats. 170), made applicable to Alaska by reference by Section 9 of the Alaska Organic Act (August 24, 1912, 37 Stats. 512), recognized the power of the Territorial Legislature to pass laws for the protection of game or fish.

So far as we know, this Act was never referred to by the Attorney General, and in any event the reasoning seems clearly unsound. The Act of 1886 procided merely that the legislatures of the territories should not "pass local or special laws" with respect to a number of subjects, one of which was "the protection of game or fish." Section 9 of the Organic Act merely reenacted this, by saying that the Legislature of Alaska should not pass local or special laws "in any of the cases enumerated in the Act" of 1886. Even considering this much only of the Organic Act, it is obvious that no grant of power was intended. The Act of 1886 was purely a limitation on powers granted elsewhere by other statutes. But when we find that the Organic Act contains a direct, unequivocal and specific withdrawal of all power to "alter, amend, modify or repeal" the laws relating to game or fish, the argument loses all semblance of plausibility. Surely a later special enactment, referring to a definite and limited subject matter, cannot be controlled, and in effect nullified, by a prior general act without do-

ing violence to all of the canons of statutory construction.

II.

Effect of Inaction by Congress

The court seems to attach some weight to the fact that this act, passed as it was in 1923, has not been nullified by Congress. In *Clayton v. Utah*, 132 U. S. 632, and numerous other cases from this court, it is made clear that the courts attach no importance to failure on the part of Congress to act, unless the inaction has been so long continued as to have permitted a rule of property to be established. In no event does this doctrine of tacit approval permit legislation in conflict with the acts of Congress. *Clayton v. Utah*, supra.

We have here an act which even now has been in force less than three years. It involves a public function and not a rule of property. The circumstance that Congress, in that short period, has done nothing about it seems to us to be literally evidence of nothing whatever.

Nor does the fact, adverted to in the opinion, that this case was decided in the District Court (Record p. 33) 44 days before Congress passed the Amendment of June 6, 1924, revising the fish laws, lend any

support to the argument. The District Court allowed a writ of error on the same date that the judgment was signed (Record p. 38). The case was pending before the Circuit Court of Appeals on June 6, 1924. No one then knew or could know what the ultimate result would be. Section 8 of that act merely provided that nothing contained in it should detract from the powers of the Territorial Legislature to impose taxes or otherwise. It was purely precautionary; neither a grant of power nor a sanction of the manner in which the Territorial Legislature had previously exercised its authority.

III.

Regulation of Canneries as Distinct From That of Fisheries

Another point made by the court in support of its rule is that this act only purports to affect canneries and cannot, therefore, amount to a regulation of fishing. Subsection 8 of Section 2 of the Act attacked contains the provisions here involved. This subsection is headed "Fisheries"—not "Fisheries and Canneries." In other words the Legislature has treated a cannery as embraced within the description of "Fisheries."

Nor does the law purport to impose a tax on canneries. The tax is "*on a pack of kings, reds and*

sockeyes counted together at any one cannery." Would the court uphold a state tax of ten cents per ton on all freight in excess of one thousand tons handled through any one railway station, as applied to interstate commerce, on a ground that it was a regulation of stations? It is the pack of fish and consequently fisheries upon which the burden is imposed, not the cannery.

But even taking the court's view, it is nevertheless true—and a matter of common knowledge—that all but a negligible fraction of the salmon caught in Alaska are caught to be canned. They actually are canned. They must be canned within a period of not more than 48 hours after being taken from the water (Act of June 26, 1906, Section 7, supra), and they can only be canned at a cannery. Does it not necessarily follow that a restriction placed upon a cannery is a burden upon fishing? Would not an act prohibiting the canning of more than one thousand cases of salmon at any one cannery be a regulation of fisheries? The difference between such an act and this one is merely verbal and formal.

Finally, both the Circuit Court of Appeals for the 9th Circuit in this case in the court below, 2 Fed. (2d), 9, and the Supreme Court of Oregon in the case of *State v. Hume*, 95 Pac. 208, have directly passed

upon this question. They both decided that canning and fishing constitute one business, as we have contended. Neither of these cases is referred to in the opinion.

IV.

Bailey v. Drexel Furniture Co., 259 *U. S.* 20.

Our two most serious and elaborate arguments, namely, those based upon the above case (the second Child Labor case) and that grounded upon the Fifth Amendment, were summarily brushed aside by the court.

With respect to the first no reasons whatever are advanced. Our contention is in fact not even mentioned. In the case cited this court said, "Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, *but not so when one sovereign can impose a tax only, and the power of regulation rests in another.*" We thought, we argued strenuously, and we still think that this is directly applicable, word for word, to the present case. We may be wrong, but the court has not seen fit to tell us why. The argument is fully set out in the briefs and need not be repeated. We can only say most respectfully, but most earnestly, that we think

a consideration of real weight has not been dealt with as the importance of the case would seem to justify. Perhaps we did not sufficiently stress it. But whatever the cause may have been, we would greatly like to have an opportunity of presenting it again.

V.

The Fifth Amendment

The ground of invalidity urged under this heading has been passed over by the court substantially unnoticed. None of the numerous cases, such as *Cutting v. Kansas City*, 183 U. S. 79, which we relied upon, has been referred to in any way. The court merely says that "classification of taxes by the amount of corpus taxed has been sustained in various connections heretofore."

We deny that any classification such as that here adopted has heretofore been upheld. No such case was cited by the Attorney General; none is cited by the court, and we have found none. On the contrary, we have shown by repeated reference to occupational taxes (Brief pp. 27-41) that they have uniformly been held void where a classification has been made on the basis of amount of corpus alone. To be sure, one owning two articles may properly be taxed twice as much as the owner of but one. This is not classi-

fication; both are in the same class. But when the owner of two is taxed twice as much for the second as he is for the first, we submit that an unlawful discrimination is made. And we further submit that all of the cases so hold. At least none to the contrary has been suggested.

VI.

The Right of the Territory to Regulate Fisheries

In the introduction to this petition we referred to the consequences of the court's holding that the Territory has this right. In discussing some of the specific portions of the opinion we have mentioned some of the reasons militating against this conclusion. The argument was presented only in condensed form in our reply brief. This, of course, is not the place to set it out elaborately. However, we would like to outline as briefly as possible the reasoning which we think leads to the conclusion (adopted by the Circuit Court of Appeals in the Auk case, supra) that the Territory is wholly without power to regulate fisheries.

(a) All Such Power Has Been Specifically Withheld by Congress

Section 3 of the Organic Act provided:

"That the authority herein granted to the legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal or other general laws of the United States, or to the game, fish and fur-seal laws * * *."

In other words, Congress wholly withdrew from Territorial jurisdiction certain classes of general laws, such as those relating to customs, and the fish laws. Whether or not the Territory would have had any power to change the customs laws, for example, in the absence of such an enactment is beside the question. The point is that Congress evidenced the same intention with respect to such general laws and with respect to the fish laws.

(b) Congress Has Fully and Exclusively Occupied the Whole Field

At the time the Organic Act was enacted the Act of June 26, 1906, (34 Stats. 478), recently amended by the Act of June 6, 1924, supra, was in force. This Act contained detailed provisions for the regulation of fisheries. It dealt specifically with the question of close seasons. The Amendatory Act referred to, as

we have heretofore mentioned, goes into considerably greater detail, and by delegation of authority to the Secretary of Commerce effectively and fully covers the whole field.

The following authorities go much further on this point than it is necessary to go in the instant cases:

Adams Express Co. v. Croninger, 226 U. S. 491;

Missouri, Kansas & Texas R. R. v. Harriman, 227 U. S. 657;

Atchison & Topeka Ry. v. Harold, 241 U. S. 371 (378);

St. Louis Iron Mountain & Southern Ry. v. Edwards, 227 U. S. 265.

These were all cases where the states had established regulations that were merely additional to, and not in terms inconsistent with, congressional legislation.

The following cases specifically decide that the states have no power to add to or supplement the federal laws in a field in which Congress has paramount authority:

Prigg v. Pennsylvania, 16 Pet. 536 (617);

Erie R. R. Co. v. New York, 233 U. S. 671 (680, 683);

Charleston & Carolina R. R. Co. v. Varneville Co., 237 U. S. 597 (604);

Southern Ry. Co. v. R. R. Commission, 236 U. S. 439 (446).

The substance of the foregoing authorities is that where Congress has entered a field, then any regulation whatsoever whether it be identical, additional or less than the Congressional regulation, is void and of no effect.

Furthermore, the rule is the same where Congress, as in the Act of June 26, 1906, supra, and the Amendatory Act of June 6, 1924, has empowered an executive or administrative body to promulgate regulations.

Actiesselskavet Ingrid v. Central R. R. Co., 216 Fed. 72 (82).

(c) MEANING OF "ALTER, AMEND, MODIFY OR REPEAL"

The words "alter, amend, modify or repeal" clearly include the meaning "add to".

2 C. J. 1165;
2 C. J. 1316;
Soule v. Soule, (Calif.) 87 Pac. 205.

(d) THE POINT HAS NEVER BEEN DECIDED EXCEPT AS WE CONTEND

Nor does the case of *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U. S. 44, referred to in the opinion, in any manner sustain the right of the

Territory to regulate fisheries. It is true that that case contains certain language to the effect that, in enacting a taxing measure, a consideration of collateral advantages is not improper. This language was addressed to the contention that the act in question violated the due process clause of the Fifth Amendment. The case held simply and solely that the act was what it purported to be, namely, a taxing measure, and was neither a violation of the due process clause nor an attempted regulation of fisheries.

That act contained no such features as are present in the one here involved. As we have stated, the portion of that case referred to in the court's opinion here, related only to the due process clause. When the court came to consider the contention that the act violated the Organic Act, for the reason that it constituted an increase of the tax prescribed by the Act of June 26, 1906, the court simply said that the tax imposed by the Act of 1906 was not a fish law. It did not say, and never has said that a fish law may be enacted under the guise of a taxing measure.

CONCLUSION

We have presented as concisely as the subject matter will allow our reasons for asking for a rehearing. We feel, with all due respect, that the court has not

appreciated and has not decided the fundamental questions involved in this case. We feel too that the court has decided, greatly to our disadvantage, a question which was not properly in the case and which we argued only incidentally.

We, therefore, most earnestly request that the court set this case down for further argument.

Respectfully submitted,

E. S. McCord,
Warren Gregory,
A. E. Robertson,
H. L. Faulkner,
Attorneys for Plaintiff in Error.

The undersigned, E. S. McCord, one of the attorneys for the plaintiff in error, hereby certifies that in his opinion the foregoing petition is well founded in law, and that the same is not interposed for delay.

E. S. McCord.

Appendix

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 246

PACIFIC AMERICAN FISHERIES, Petitioner,

vs.

TERRITORY OF ALASKA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit by the Territory of Alaska to recover from the petitioner, Pacific American Fisheries, license taxes alleged to be due upon cases of salmon packed by the defendant at four canneries named. The defendant in its answer set up that the territorial taxing act was contrary to the Act of Congress of August 24, 1912, c. 387, (§ 3), 37 Stat. 512, creating a legislative assembly in the Territory of Alaska, and to the Constitution of the United States. The Territory demurred; there was a judgment for the plaintiff and this was affirmed by the Circuit Court of Appeals. 2 Fed. Rep. (2d) 9. A writ of certiorari was granted by this Court. 267 U. S. 589.

The taxes in question were imposed by c. 101 S. § 2, subdivision 8th, Laws of Alaska, 1923, amending c. 31 of the Laws of 1921. By (c) of that subdivision salmon canneries, after a tax by (b) of ten cents per case, are charged an additional tax on a pack of kings, reds and sockeyes, counted together, at any one cannery, as follows: On all cases in excess of ten thousand and not more than twenty-five thousand, five cents per case; in excess of twenty-five thousand and not more than forty thousand, ten cents per case; in excess of forty thousand and not more than fifty thousand, fifteen cents per case; and on all in excess of fifty thousand, twenty cents per case. Similarly in (d) and (e) a tax of four and one-half cents per case is imposed on medium reds, cohoes, and pinks; with additional taxes for each increase of numbers as in the previous subdivision. By (f) chums are taxed three cents per case. The petitioner says that this graduated tax is inconsistent with the Act of Congress mentioned, which provides that the authority therein granted to alter, amend, modify and repeal laws in force in Alaska should not extend to the game, fish and fur seal laws, and presses this contention notwithstanding the further proviso that this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. The petitioner also says that the classification upon which

the surtax is based is unreasonable and a denial of due process of law, contrary to the Fifth Amendment of the Constitution of the United States. No question is raised about the uniform tax of ten cents per case imposed by (b). That has been paid.

The petitioner offers various reasons to show that this tax is not what it purports to be but is an attempt to regulate fisheries, which, the petitioner believes, Congress has not given the Territory power to regulate. The answer alleges that it was known that the revenue from these taxes would exceed the appropriations and needs of the Territory, and from this and other things the conclusion is drawn that the taxes were levied with the intent of driving the defendant out of its business. But the premise could not be known, it only could be prophesied. If known the conclusion as to legislative intent would not follow; and if the intent were entertained, in the only sense in which it rationally could be imputed, that is, to discourage canning the larger amounts, the legislature lawfully might act with that intent. Fisheries were not the direct object of attack, but canneries. It would require a strong case in any event to invalidate a tax on things that the legislature had power to regulate because of its collateral reaction on something else. But here even as to fisheries the legislature is given power to tax. (Any tax is a discour-

agement and therefore a regulation so far as it goes, and the most plausible reconciliation of this power with the restrictions upon amending or modifying the laws in force is that the only purpose of the restrictions was to prevent the Territory from doing away with all protection, in a shortsighted rush for fish.) At least we must take it to be clear that the unlimited power expressly given may be exercised with consideration of collateral advantages and disadvantages. *Alaska Fish Salting and By-Products Co. v. Smith*, 255 U. S. 44, 48. It could not be exercised intelligently otherwise. The extent of the power is a question of specific interpretation not of general principle; and therefore we leave the many familiar cases that were cited, on one side.

It is not unworthy of notice that in § 9 of the Act of August 24, 1912, an earlier statute of July 30, 1886, c. 818, § 1, 24 Stat. 170, is taken up, in which the power of the territorial legislatures to pass laws for the protection of game and fish is recognized, and also that the latest revision of the fish law by Congress was passed after the present tax law had been enacted and had been upheld by the District Court; that it provided that nothing therein contained should curtail the powers of the Territorial Legislature of Alaska, and that it showed no sign of dissatisfaction

with the way in which those powers had been used. Act of June 6, 1924, c. 272, § 8; 43 Stat. 464, 467.

It is much pressed that the tax discriminates against large canneries in favor of small ones—this especially as contravening the Fifth Amendment and denying due process of law. Classification of taxes by the amount of the corpus taxed has been sustained in various connections heretofore. By way of specific answer it is pointed out by the Attorney General of Alaska that the size of the run of salmon cannot be foreseen; that a cannery must be prepared to its full capacity; that there always will be an irreducible minimum of expense to be borne whatever the size of the pack; that therefore a small pack may mean a loss and a larger one a profit, and that on these considerations the law justly may attempt to proportion the tax to the probable gains. The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights. Judgment affirmed.